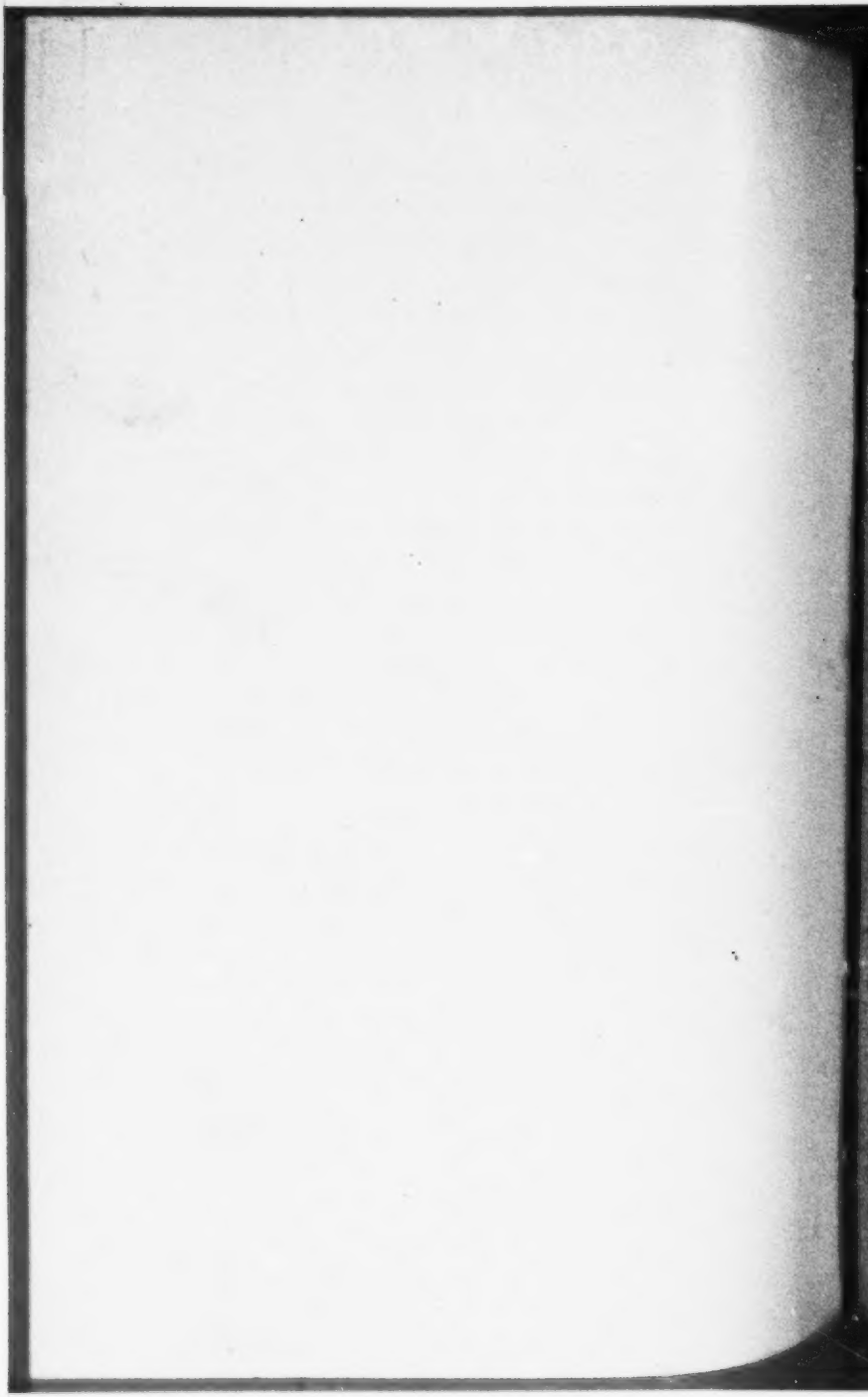

No. 525 & 526.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Brief of Lewinson for Appellants

Office Supreme Court U. S.
FILED
JAN 27 1902
JAMES H. MCKENNEY,
Clerk.

CHIN BAK KAN,
Appellant,
vs.
THE UNITED STATES.

No. 525.

CHIN YING,
Appellant,
vs.
THE UNITED STATES.

No. 526.

Filed Jan. 27, 1902.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO VACATE ORDER FOR BAIL.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

CHIN BAK KAN, Appellant, vs. THE UNITED STATES.	No. 525
CHIN YING, Appellant, vs. THE UNITED STATES.	No. 526

On appeals from the District Court of the United States for the Northern District of New York.

Brief for Appellants in Opposition to Motion to Vacate Order for Bail.

This is a motion to vacate orders authorizing defendants-appellants to give bail in the sum of $500 each, made by Mr. Justice Peckham on October 1st, 1901, after allowing these appeals to this Court, in cases arising under the Chinese Exclusion Acts. Defendants were charged before a U. S. Commissioner under Section 12 of the Act of

1884 (23 Stat., 115), with being Chinese persons who had entered the United States unlawfully, and the Commissioner ordered their deportation, which order was affirmed by the District Court. Direct appeals were taken to this Court because treaty and constitutional questions are involved (U. S. vs. Mrs. Gue Lim, 176 U. S., 459; U. S. vs. Wong Kim Ark, 169 U. S., 649; Lem Moon Sing vs. U. S., 158 U. S., 538; Fong Yue Ting vs. U. S., 149 U. S., 698; Lau Ow Bew vs. U. S., 144 U. S., 47, 58).

The Government's motion papers concede that the merits of these cases are not presented for consideration upon the present motion, but only the question of the authority to allow bail; counsel for appellants join the Government in seeking a determination of this question.

In view of the concession by the Government that the merits of the appeals are not presented upon the present application, appellants reserve until the argument discussion of the merits, and will not now enter into a consideration of various unwarranted assumptions made by the learned counsel for the Government in Point I of the brief for the United States, nor upon efforts to refute various propositions of law there stated, believed by counsel to be erroneous. Let it suffice for present purposes to point out that these cases raise the question whether the U. S. Commissioner had jurisdiction to order defendants' deportation, in view of the asserted repeal by implication of the procedure Statute (Sec. 12 of the Act of 1884), by the Treaty between the United States and China of 1894. This point is also raised in the case of United States vs. Lee Yen Tai, in which, in habeas corpus proceedings, Judge Addison Brown sustained the contention made by these appellants in the U. S.

District Court for the Southern District of New York, and the point was deemed so serious and doubtful that on the Government's appeal it was certified to this Court by the Circuit Court of Appeals for the Second Circuit. Besides a passing reference, not bearing upon procedure, in the case of U. S. vs. Mrs. Gue Lim, 176 U. S., 459, this was the first occasion on which the Treaty of 1894, with its marked changes in our policy of dealing with Chinese persons, came before the Courts, and the question was never before raised in the Courts, much less decided. It is not claimed that exclusion by executive action is no longer authorized, but merely that the Treaty of 1894 abolished the system of deportation by judicial procedure of alleged Chinese persons charged to have unlawfully entered the United States, *thus assimilating the practice in these cases to that in vogue as to all other aliens coming here under restrictions.* That such was the purpose of the Treaty is clearly expressed in the diplomatic correspondence between the two countries attending its negotiations. The cases further present on the merits the question whether the inadequate complaints herein were sufficient to confer jurisdiction on the U. S. Commissioner (compare Rice vs. Ames, 180 U. S., 371), whether Article IV of the Treaty of 1894 has not repealed the Section throwing the burden of proof in these cases on the defendants (Section 3 of the Act of May 5th, 1892), whether that statute is not unconstitutional in requiring persons, whether "Chinese persons, or persons of Chinese descent" claiming to be citizens of the United States by birth (U. S. vs. Wong Kim Ark, 169 U. S.), to establish "by affirmative proof, to the *satisfaction*" of an inferior magistrate like a U. S. Commissioner, holding no court of record, their "lawful right to remain in the United States," and various other questions.

But the present motion is designed to raise merely the legality of the order for bail. When there were judicial proceedings pending against Chinese persons charged with being in the United States unlawfully, by reason of an unlawful entry, bail seems to have been freely allowed in scores of cases, and the right was never even challenged until about April, 1901. Bail was allowed in every one of the cases hereinbefore cited, carried to this Court on appeal, and in many other cases in the lower Courts. The Courts found no difficulty in ascertaining what amounts would suffice to ensure defendants' presence, $300 and $500 bail was found ample in cases of unsuccessful appeals in scores of these cases, and the Government's assumption that the giving of bail is a mere cover for an escape is utterly unwarranted in fact, and is an argument applicable, with even greater force (such as it is) against bail in any criminal case, because of the greater temptation. The two express statutory prohibitions (pp. 12, 14, *post*) upon taking bail in certain classes of cases under the Chinese Exclusion Laws were recognized in the cases to which they were applicable, but were treated, during many years' experience, as without bearing upon classes of *cases like these*, in which persons actually within the United States were arrested in judicial proceedings for their deportation under the Chinese Exclusion Laws, charged with unlawful entry into the United States, and had sued out the appeals the law grants them to maintain their rights. Early in April, 1901, the United States Attorney for the Northern District of New York, first, on behalf of the Government, seems to have conceived of the idea of endeavoring to curtail the right to bail by judicial construction, and thus to make these laws much more oppressive than they had been theretofore.

Accordingly, motions were made before the Circuit Court of Appeals for the Second Circuit in two cases to vacate the orders authorizing bail in the sum of $300 to be taken, and these Government motions, after extended argument, were denied on technical grounds, not involving the merits (U. S. vs. Lee Yen Tai, 108 F. R., 950, C. C. A; U. S. vs. Moy Yee Tai, 109 F. R., 1, C. C. A.).

In the interim, the same government officer made a similar motion before Judge Addison Brown in the case of U. S. vs. Du Shen Tau; the opinion of that learned Judge, denying the Government's motion, May 3d, 1901 (not yet reported), is printed in full *post* (p. 21), and recognizes specifically the common and unbroken custom theretofore prevalent to take bail in such cases, and that the alleged statutory prohibitions invoked by the Government were not regarded as applicable.

Since then various Judges, including Judge Wheeler, who sat in the Circuit Court of Appeals when the above cited Lee Yen Tai and Moy Yee Tai motions were argued, have taken bail. On the hearing on the merits in the Lee Yen Tai case in the Circuit Court of Appeals, the Government did not see fit to renew its attack on the order for bail, but withdrew that motion, probably because an adverse decision was feared.

Counsel, on applying to Mr. Justice Peckham to allow the present appeals, sought to be taken direct to this Court because treaty and constitutional questions were involved, acquainted him with the precise condition of the controversy, and Mr. Justice Peckham, after reading Judge Brown's opinion in the above cited case of Du Shen Tau, determined to follow it, fixed the amount of bail at $500 and authorized any U. S. Commissioner within the Second Circuit to take such recognizance. (Compare Hudson vs. Parker, 156 U. S., 277.)

These are the orders now sought to be vacated by the Government. It is not understood, and certainly not contended even in the Government's Brief herein, that it has ever before been held in any Federal Court, that bail in this class of cases of appeals in judicial proceedings for alleged unlawful entry of Chinese persons actually here, is unauthorized.

POINT I.

The right to bail in this class of cases was freely recognized by the Courts before the Acts of 1892 and 1893, and has been since then also, and is authorized by law.

The right to bail while legal proceedings are pending is an inherent right, safeguarded by the Federal Constitution. Possibly, as applied to deportation of conceded aliens, it may be constitutionally abridged for a short period by Congress (but see Point V, *post.*), but, as more fully shown hereinafter, no legislation has curtailed the right in the class of cases here involved; but Congress, recognizing the existing general right, has, by special provisions, abridged it only in certain classes of cases not here involved. If express statutory authority for bail be needed, it is to be found in the general provisions of R. S., 716, as to authority to issue all necessary writs and process, and the more specific provisions of R. S., Sec. 945, authorizing bail in all civil cases, and Sections 1014 and 1015, and Rule 36 of the Rules of this Court, applying to criminal cases (Hudson vs. Parker, 156 U. S., 277). In habeas corpus cases it is covered by specific special provisions (R. S., Sec. 765, and Supreme Court Rule 34).

These causes are either criminal or civil, within the meaning of these alternative provisions. In discussing the non-registration proceedings, this Court has said (Fong Yue Ting vs. U. S., 149 U. S., 698, 728):

> "When in the form prescribed by law, the executive officer, acting on behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power, for here *are all the elements of a civil case*—a complainant, a defendant and a judge,"

apparently recognizing their character of civil suits, within the meaning of such sections as R. S. 945. If the same case be regarded as authority for the view that, under some sections, they are not criminal proceedings, still they may be so held under others (U. S. vs. Zucker, 161 U. S., 475; Wong Wing vs. U. S., 163 U. S., 228), as was held for purposes of fixing the fees in these cases of U. S. Marshals (Jacobus vs. U. S., July 16, 1899, C. C. A., Sec. Circ., still unreported) and for determining the right to require defendants to testify in these cases (Ex. p. Sing, 82 Fed. Rep. 22 (Coxe, J.); Sec. 860; Boyd vs. U. S., 116 U. S., 616; Lees vs. U. S., 150 U. S., 476).

But whether civil or criminal, the 8th Amendment to the Constitution of the United States is general in its application, in providing that "excessive bail shall not be required," and, it is submitted, *forbids total denial of bail* (see Point V. *post.*).

The right to give bail in Chinese exclusion cases during the pendency of legal proceedings was repeatedly declared by the Courts prior to the acts of 1892 and 1893, has been constantly

recognized since then in the class of cases here involved, and does not appear to have been even questioned until these groups of appeals were allowed.

In the case of The Unused Tag, 21 F. R., 701, 706, Judge Sawyer held:

> "When the body (of Chinese applicants to land in habeas corpus proceedings) is produced in Court the petitioner is, for the time being, in the custody of the law, and he can be temporarily committed to the custody of the party producing him, if deemed safe to do so, or committed to the custody of the Marshal, or admitted to bail until the lawfulness of the detention can be inquired into and determined."

In the case of *In re* Chow Goo Pooi, 25 Fed. Rep., 77, the U. S. Circuit Court for the District of California (Sawyer, Hoffman & Sabin, JJ.), held in 1884, with respect to the right of a Chinese applicant for admission into the United States in habeas corpus proceedings:

> "When his body, in obedience to the writ, is produced in Court, we are also of opinion that the control of his body remains with the Court, and that he may be committed to the custody of the marshal, or be held to bail to await the decision of the Court."

Furthermore, in that case, in discussing the question whether the procedure section here involved authorizes, in spite of its vague language, a judicial hearing and, after final decision, the right to keep Chinese defendants in custody or to bail them, it was said:

> "We therefore hold, though not without some hesitation, that the act does by implication confer upon the justice, judge or commissioner the right, after having determined that the person is not entitled to be or remain

> in the United States. to commit him to the custody of the Marshal, or to hold him to bail for a reasonable time, until the President's direction can be had."

The doubt was as to the right to have the Court detain the prisoner in such cases or to bail him, while the Act (Sec. 12 of the Act of 1882 before its amendment in 1884), provided for deportation by direction of the president, no appeal or other legal proceedings in the cause being pending.

In the case of the Chinese Wife, 21 Fed. Rep., 808, the question was presented as to the right to bail Chinese petitioners in habeas corpus proceedings, after final orders of deportation had been made in those proceedings, until the departure of the deporting vessel, no appeals or other legal proceedings being pending. (In fact, at this time, no such appeals could be taken, as Section 764, Rev. St., had not yet been amended by the Act of March 3d, 1885 (23 Stat., 437) so as to allow appeals from the Circuit Court in habeas cases generally). Justice Field denied the right, while Judges Sawyer, Hoffman and Sabin concurred in maintaining it. Under the statute, the presiding justice's decision was binding, but the difference of opinion between the judges was certified to this Court, but not decided, because in the interim, petitioner had been deported (Cheong Ah Moy vs. U. S., 113 U. S., 216).

Judge Sawyer, on behalf of himself and the two concurring judges, said:

> "When the body of a petitioner is produced in Court, on the return to a writ of habeas corpus, the petitioner is in the control of the Court. Pending the proceeding to determine her rights, the Court can temporarily and provisionally commit the petitioner to the party detaining her, if deemed safe and proper to do so, or may commit her to the

> custody of the marshal, or may admit her to bail. In either case she is in the custody of the law. When an order to remand has been made, and the petitioner placed in the custody of the marshal for the purpose of executing the order to remand, she is still in the custody of the law, and under the control of the Court till the order to remand has been finally executed. The marshal is but the executive arm of the Court, and while the petitioner is still in his custody, by reason of the order to remand not having been fully carried out, both she and the marshal are under the control of the Court; and *the Court, in my judgment, has jurisdiction and authority to admit to bail during any further necessary detention or any unavoidable delay which prevents an immediate execution of the order to remand.* In my judgment the admission to bail under such circumstances and for such purpose would not, in contemplation of law, be a landing of the petitioner contrary to the provisions of the Chinese restriction act."

It will be observed that all the judges in these cases concurred in the question as to the right to bail while legal proceedings were pending, the dissent being only in cases of application for bail *after* non-reviewed final decision, when the Court might be regarded as *functus officio*. Nor, conceding the question of power, did Mr. Justice Field dissent from the concluding paragraph of the opinion of his associates, as follows:

> "*Conceding the power of the Court to admit the applicant to bail under the circumstances stated, I think it would be a great hardship, not to say a gross violation of her personal rights, to refuse it upon security satisfactory to the Court.* I think she should be admitted to bail."

This language is precisely in accord with the language of Mr. Justice Gray, speaking for this Court as to right to bail in criminal appeals, in the case of Hudson vs. Parker, 156 U. S., 277, 285. This Court said in that case:

> *"The Statutes of the United States have been framed upon the theory that a person shall not, until he has been finally adjudged guilty in the Court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail not only after arrest and before trial, but after conviction and pending a writ of error."*

It is submitted that this principle applied equally to persons whose only crime is the color of their skin.

All these Chinese cases involved attempts at landing by means of habeas corpus, and release on bail therein, and it was uniformly held that the Court, in the absence of statutory provisions, could bail Chinese persons during the pendency of legal proceedings involving them. *A fortiori* was bail permissible where persons actually found in the country (and who may be merchants or citizens, who never left the country), were arrested here in judicial proceedings instituted by the Government for their deportation on a charge of alleged unlawful entry, and the element of securing admission into the country by means of judicial machinery was absent, and there was no final, non-reviewable decision against them.

In fact, the practice has long existed in favor of allowing bail pending appeal in these cases, even after a final order of deportation. This is clearly indicated by Judge Brown's opinion in the Du Shen Tau case (see Point IV), (though he wrote guardedly, as the question was then before an appellate Court) and to counsel's knowledge, all

of the following Judges in the Second Circuit have allowed bail on appeal after order of deportation: Judges Lacombe, Brown, Thomas, Wheeler and Adams. It was allowed, as disclosed by the Records on Appeal, in the following cases which were before the Supreme Court: *In re* Li Sing (180 U. S., 486, and below), U. S. vs. Pin Kwan; U. S. vs. Pin Yik; U. S. vs. Mrs. Gue Lim, 176 U. S., 459; U. S. vs. Wong Kim Ark, 169 U. S., 649, 652. It was allowed by Judge Lacombe in cases brought to this Court entitled *In re* Li Sing, 180 U. S., 486, and *In re* Charley Leung, 86 F. R., 303, and in other cases in other districts. No case to the contrary is even claimed to exist. *Such long practical construction without objection even by Governmental executive officers is itself entitled to great weight* (Pennoyer vs. McConnaughy, 140 U. S., 1, 23; U. S. vs. Railway Co., 148 U. S., 562).

POINT II.

The prohibition of Section 5 of the Act of 1892 (2 Sup. R. S., p. 13) upon bail on habeas corpus in certain Chinese cases does not apply here, this not being "an application to any judge or Court of the United States in the first instance for a writ of habeas corpus by a Chinese person seeking to land in the United States, to whom the privilege has been denied."

Appellants entered the United States by land and were thereafter arrested here in judicial proceedings on the Commissioner's warrant, while the statute just quoted refers only to cases where

landing in the United States is sought to be effected by means of a habeas corpus, by one prevented from landing, its purposes being obviously to prevent the use of judicial machinery itself to secure admission at large into the country.

In its brief herein, the Government concedes that this statute does not apply to these cases, but invokes it as supposed to indicate a legislative policy here applicable. It is submitted that the very opposite is the proper inference. The statute recognizes the general right to bail in these cases and forbids its allowance in a particular instance, involving materially different circumstances than are here present. The rule "*Expressio unius est exclusio alterius*" is, it is submitted, directly applicable.

In its brief herein the Government quotes from a decision by Judge Lacombe in the case of

In re Chin Yuen Sing, 65 F. R., 788,

in which, without deciding the question of *power* to bail, that judge declined to exercise it, as a matter of discretion, where an appeal was taken by a Chinese petitioner *seeking to land in the United States by means of habeas corpus proceedings*, from a decision adverse to him. As already observed, that case presented the question of attempt to enter the country by means of habeas corpus proceedings, unlike this case. But it is within the personal knowledge of counsel (one of whom had charge of this very case on behalf of the Government as Assistant United States Attorney) and shown by the records of the Circuit Court and the U. S. Attorney's office, that in that very case, when the bad effects upon that defendant's health resulting from confinement in jail under conditions of detention and food so foreign to him, were subsequently called to the at-

tention of the Court, both the question of "power" and of "discretion" were subsequently determined by Judge Lacombe in that defendant's favor, by bailing him.

Similarly, in the Wong Kim Ark case (169 U. S., 649, 652), involving the same conditions, bail was allowed, notwithstanding the prohibition of Section 5 of the Act of 1892, in favor of one claiming American citizenship. That question cannot be absolutely prejudged, until the final decision on the appeal. This was in line with Hudson vs. Parker, *supra*.

POINT III.

The provision of the Act of 1893, invoked by the Government, is not applicable because it relates only to orders for deportation in non-registration cases, and not to cases of alleged unlawful entry, such as are here involved.

This is the principal provision relied on by the Government, being a portion of Sec. 2 of the Act of November 3, 1893 (2 Supp. R. S., p. 154, 28 Stat., 7), reading as follows:

> "Such order of deportation shall be executed by the United States Marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and *pending the execution of such order*, such Chinese person shall remain in the custody of the United States Marshal, and *shall not be admitted to bail*."

(a) *By its express terms the provision is limited to* "SUCH" *orders of deportation, and does not apply to all deportation orders.* An examina-

tion of the statute shows clearly that it refers only to non-registration cases and not to alleged unlawful entry cases, such as are here under consideration. The only possible antecedent for "*such*" orders of deportation, and in fact the only order of deportation under consideration in the whole Act of 1893 (or in Section 6 of the Act of 1892, for which it is a substitute), is the order of deportation for non-registration. In the Act of 1893 there are only two references to orders of deportation, besides the particular clause invoked by the Government. The first is in the non-registration clause, which provides:

> That a Chinese person arrested for *non-registering* "may be taken before a United States Judge, whose duty it shall be to *order that he be deported from the United States, as provided in this act and in the act to which this is an amendment*, unless he shall establish clearly to the satisfaction of said Judge," etc.

This is obviously the antecedent of "such order," and relates only to non-registration, and not to unlawful entry cases (Fong Yue Ting vs. U. S., 149 U. S., 698, 725–6). The proviso of the amended Sec. 6 of the Act of 1893 also refers to deportation for non-registration, but merely by *excepting* convicted felons from the provisions of the Act of 1893 granting an additional six months within which to *register*, and discontinuing pending cases.

Obviously, in making provision for "such" orders of deportation, only the orders specified in the Act of 1893 were referred to. The Government's construction seeks to eliminate the word of limitation "such" from the statute, and make the section applicable to orders of deportation not referred to in the Act of 1893. The language of

this Court in U. S. v. Gooding, 12 Wheaton, 460, 477, as to the same term is directly applicable. Judge Story there said for this Court:

> "But it is sufficient to say that the word 'such' has an appropriate sense, and can be reasonably referred only to the ship or vessel *previously* spoken of. * * * If we were to adopt any other construction, we should read the words as if 'such' were struck out and the clause stood 'any ship or vessel.' Such a course would not be defensible in construing a penal statute."

The Government asks this Court in effect to legislate, not to construe this statute (U. S. vs. Goldenberg, 168 U. S., 95) and, as in the Gooding case, to substitute "any" for "such."

(*b*) *The language of the amended Section 6 shows clearly that the custody and bail provision of Section 2 of the Act of 1893 refers only to it.* The original Section 6 of the Act of 1892 (2 Sup. R. S., p. 13, 27 Stat., 25) had provided that a Chinese laborer not registering, after arrest, "shall be taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided." The "hereinbefore provided" clause was Section 2 of the Act of 1892, enacting that convicted defendants shall be deported to China, unless they establish that they are subjects of some other country (Section 4 was eliminated by the holding that it is unconstitutional. Wong Wing v. U. S., 163 U. S., 228). The amended Sec. 6 of the Act of 1893 now provided that persons convicted for non-registering shall "be deported from the United States, *as provided in this act* and in the act to which this is an amendment;" thus referring, in deportation cases for non-regis-

tering, not only to this provision of the Act of 1892 as to country of deportation, but to the very provision on the subject of deportation here invoked in the Act of 1893. The only provision in the Act of 1893 as to method of deportation is this custody and bail provision, which is thus *incorporated by reference into the non-registration provision*, and this clearly shows once more that the term "*such* order" corresponds with this clause of the *non registration provision*.

(c) *The whole Act of 1893 in terms amends only the non-registration provision (Section 6) of the Act of 1892, by substituting its two sections for the original Section Six.* The enacting clause of the Act of 1893 expressly provides that "Section 6" of the Act of 1892 "is hereby amended so as to read as follows," thus substituting the two new sections for the original section. The bail clause is contained in one of these sections. The registration provisions of the statute, which had just been sustained as constitutional in the Fong Yue Ting case (149 U. S., 698) were amended by giving the thousands of Chinese persons who had not registered, under advice that the Act was unconstitutional, a further opportunity to register, and by enacting additional procedure provisions as to such registration. The scheme of the amendment shows that it applies only to registration cases.

(d) *Throughout the Act of 1893, whenever it was intended to make any provisions apply to unlawful entry cases, the language used unmistakably indicates this:* The Geary law in 1892 first introduced the registration features (Sections 6 and 7), and whenever the unlawful entry cases are under consideration, Congress in the Act of 1893 took care to employ such words as "*in the act to which this is an amendment*," in addition to the words

"in this act." Notice, in Section 2 of the Act of 1893 (2 Sup. R. S., p. 154), the first two definition provisions, so drawn. Similarly, in the Act of 1892, the language is carefully selected to make certain provisions apply to unlawful entry cases and others to non-registration cases. In fact, in the Fong Yue Ting case (149 U. S., at 725), this Court, after referring to Section 1 of the Act of 1892, as continuing the earlier acts, adds:

> "The rest of the act (laying aside an immaterial Section 5, relating to an application for a writ of habeas corpus by a Chinese person seeking to land in the United States, to whom that privilege has been denied), deals with two classes of Chinese persons; first those not lawfully entitled to be or remain in the United States; and, second, those entitled to remain in the United States. These words of description neither confer nor take away any right, but simply designate the Chinese persons who were not, or who were, authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of this Act. * * * Sections 2–4 concern Chinese 'not lawfully entitled to be or remain in the United States. * * * Sections 6 and 7 are the only sections which have any bearing on the cases before us. * * * The manifest objects of these sections are to provide a system of registration and identification of such Chinese laborers."

(*e*) So, also, the provision next following the bail provision invoked by the Government in Section 2 of the Act of 1893 shows that only the registration cases were under consideration; for it prescribes, without further introductory phrases, the form of the registration certificate.

(*f*) *Good reasons for Congress, limiting this custody and bail provision to non registration*

cases are at hand. The prime purpose of the act of 1893 was to extend the time for registering, which requirement about 100,000 Chinese persons had neglected to comply with originally, because of the doubts as to its constitutionality. To compel Chinese laborers to comply with the Act and to overcome their unwillingness, drastic measures for such non-compliance were prescribed, including this non-bailing clause.

Moreover, the non-registration proceedings are to be heard, by the terms of the statute (Sec. 6 of the Act of 1893, 2 Sup. R. S., p. 123), before a *U. S. Judge*, and not by the Court, nor by a Commissioner (Fong Yue Ting case, 149 U. S., at 728, they are, therefore, not appealable under Section 13 of the Act of Sept. 13, 1888, to the District Court, nor under the C. C. A. Act, and not being appealable at all, provisions as to bail on appeal would be meaningless.

(*g*) A few words may be added as to the non-applicability of the registration provisions. In the Government Brief it is suggested that appellants are laborers, that it is to be assumed that they did not register, and the deportation and non-bailing provisions in registration cases should be applied. This ignores, among other things, the fact that defendants were charged in the complaint, and tried, not for not registering, but for alleged unlawful entry. Moreover, the Government denies that they were in the United States when the registration provision was passed, which merely required Chinese laborers *then* in the United States to register, by its express terms. In addition it is perfectly clear that the U. S. Commissioner who ordered their deportation had no jurisdiction over a non-registration case. The non-registration provision (Section 6 of the Act of

1892, amended in 1893) confers jurisdiction over such cases on United States "judges" alone, not on Commissioners, and we do not understand the Government seriously to contend that a Commissioner is a "judge" within the meaning of this Section. This Court has decided the question to the contrary (Todd vs. U. S., 158, U. S., 278, and Rice vs. Ames, 180 U. S., 371) and the precise point under this statute has been determined (Fong Yue Ting vs. U. S., 149 U. S., at 728, oral decision by LACOMBE, J., March, 1898, in the case of U. S. vs. Sing Kin San, disapproving of a California decision to the contrary, and the Treasury Department by rulings made Feb. 27, 1899, and April 14, 1899, also declined to confuse the inferior with the superior office). It is unnecessary to consider other grounds of inapplicability of the registration provision, we believe. We desire to remark, however, that of course the Commissioner's decision that appellants are laborers, if made by him without jurisdiction, is a nullity. Moreover, the Commissioner's finding that appellants are laborers partakes of the nature of a conclusion of law. The treaty of 1880 with China authorized the exclusion by legislation of laborers only, the statutes of the United States required merchants to show their non-laborer character in a prescribed way to carry the treaty into effect (U. S. vs. Mrs. Gue Lim, 176 U. S., 459, 467), and accordingly all persons whose right to remain is denied, whether for want of affirmative evidence or as a conclusion of law, are commonly described as laborers in the order of deportation. On issues as to citizenship, the laborer status was in fact not involved.

POINT IV.

The provision about bail (Act of Nov. 3d, 1893) does not apply to appeals, which are provided for by other Acts, and the language of the Act shows that bail on appeals was not within the legislative contemplation in framing this provision.

(*a*) The opinion on this point of Judge Brown (May 3d, 1901) in U. S. vs. Du Shen Tau, *et al.*, is here directly in point; he held:

> "Upon an allowance of appeal in the above matter the Court directed that the Chinamen be admitted to bail in the sum of $500 each, and a motion has been made on the part of the Government to vacate the allowance of bail on the ground that by Section 2 of the Act of November 3d, 1893, 28 Stat. at L., p. 7, it is provided:
>
> 'That pending the execution of the order of deportation such Chinese persons * * * shall not be admitted to bail.'
>
> The uniform practice in many cases in this District since the passage of the Act of 1893, has been to admit to bail during the pendency of an appeal. Most of the Judges in this Circuit have made such orders, as I have done frequently. The provision above referred to has not been supposed to affect the authority of the Court or the ordinary practice of the Court during appeals to admit to bail, and so far as I know, this right has not been previously questioned. I am informed by counsel that the question is now pending before the Circuit Court of Appeals in this District. I have examined with some care the brief submitted by the defendants, and am of the opinion that there is reasonable question whether the above provision of the Act of 1893 was designed to affect or does in fact affect the

right to admit to bail pending an appeal. Considering that the question is now pending in the Court of Appeals, and probably will be shortly determined, and in view of the general practice previously to admit to bail, I think it is better to adhere to that practice until the decision is made by the Court of Appeals."

(*b*) Appeals in Chinese Exclusion cases are authorized by Sec. 13 of the Act of September 13th, 1888 (2 Sup. R. S., p. 144) as regards appeals from U. S. Commissioner to the District Court, and from the District Court to this Court, or the Circuit Court of Appeals, by the C. C. A. Act.

The general statues and rules as to bail apply to them. *The act of 1893 nowhere even refers to appeals, does not attempt to deal with that subject nor the disposition of Chinese persons pending appeals, and does not modify the existing system relative to that matter.*

The question is governed by the principle of statutory construction that *special statutes, like those as to appeals, are not modified or repealed by subsequent general statutes, in the absence of language unmistakably indicating that the subject matter of the special statute was within legislative contemplation.*

As said by the Supreme Court in Ex. p. Crow Dog, 109 U. S., 556:

> "The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *Generalia specialibus non derogant.* "The general principle to be applied," said Bovill, C. J., in Thorpe vs. Adams, L. R., 6 C. P., 135, 'to the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous particular act, unless there is some express reference to the

previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together.' 'And the reason is.' said Wood, V.C., in Fitzgerald vs. Champneys, 30 L. J. Ch. 782; 2 Johns & H., 31, 54. 'that the Legislature, having had its attention directed to a special subject, and having observed all circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.' "

(c) *The Act deals only with the disposition of such defendants "pending the execution of such order" of deportation, and when appeals are taken and the whole case taken to a higher Court, the "execution" of the order of deportation is in no sense "pending."* If Congress had intended to make this provision applicable to appeals, it would have used that term or at least have used such language as "*after* deportation is once ordered," and not used the phrase "pending the execution of such order." *The language of the Act is quite inappropriate to express any intention to bar bail on an appeal* or in habeas corpus proceedings. In fact, Attorney General Griggs ruled that appeals in Chinese exclusion cases, if they do not vacate the orders of deportation, at any rate suspend the order of deportation (22 Opinions, 340), so the language "pending the execution of such order" is not an apt reference to appeals.

(d) *A consideration of the history of the times and the situation which existed at the time this Act of 1893 was passed shows clearly that this act aims at conditions in no way concerning appeals.* Before its passage there were about 100,000 Chinese laborers in the United States liable to deportation for not having registered under the Act of 1892. Congress had appropriated only $50,000 for enforc-

ing all the Chinese Exclusion Acts, which amount had been previously necessary for unlawful entry cases alone. The Treasury Department construed this appropriation to be available only for unlawful entry cases. Moreover, no clause in the act in terms authorized detention pending execution of the order of deportation, and there was a controversy between the Department of Justice and the Treasury Department, as to which department was to enforce such orders. Accordingly Judge Lacombe, on May 26th, 1893, directed the discharge of Chinese persons whose deportation had been ordered in proceedings not appealed from, until the requisite departmental authority to execute the order was conferred. (*In re* Ny Look, 56 Fed. Rep., 81; see also *In re Lintner*, 57 Fed. Rep., 587.) This practice was in line with the California precedents in habeas cases already considered. The Attorney-General joined in this solution of the problem, and requested U. S. Attorneys to ask the judges in their districts to make similar orders, which was done everywhere, except in one California case (U. S. vs. Chum Shang Yuen, 57 Fed. Rep., 588; Congressional Record, 53d Congress, Vol. 25, Part II, p. 2444). When Chinese legislation was being considered by Congress at the session at which the Act of 1893 was passed, it called on the Attorney General for the correspondence relative to this decision of Judge Lacombe's, which was furnished on September 23, 1893 (see Congressional Record, *supra*). It was to meet this situation that Congress passed this provision of the Act of November 3d, 1893, requiring detention in custody and forbidding bail. *Appeals were not under consideration, but only this practice, of discharging and bailing after final unreviewed orders of deportation. The language of the Act expresses such intent, and is not applicable to appeals.*

(*e*) The intent to work such hardship as to absolutely require imprisonment pending appeals bound to take up some time, cannot be imputed to Congress from the language used, particularly not in the light of Article III of the Treaty of 1880 and Article IV of the Treaty of 1894, granting to Chinese persons protection for their person and property, such as is conferred on the most favored nation (see pp. 10, 11, *supra*).

This provision of the Treaty is no mere idle play of words, but confers and assures substantial rights, as has been held in cases involving it (Yick Wo vs. Hopkins, 118 U. S., 356, 368–9; *In re* Quong Woo, 13 Fed. Rep., 229, 233 (Field, J.); *In re* Oh Chong, 2 F. R., 733, 737–9; *In re* Parrot, 1 F. R., 481, 483, 498). If this clause in the Treaty of 1880 was modified by the Acts of 1892 and 1893, such repeal has itself been superseded by the more specific and definite provisions of the Treaty of 1894, promulgated later than those statutes.

POINT V.

The Government's construction of the Act, making it applicable to appeals, would render it unconstitutional, the Courts having held that imprisonment as distinguished from mere brief detention incidental to deportation, renders these Deportation Acts unconstitutional (Wong Wing vs. U. S., 163 U. S., 228; U. S. vs. Wong Dep Ken, 57 Fed. Rep., 206; In re Lintner, 57 Fed. Rep., 587), and it would also be superseded by the later provision of Article IV of the Treaty of 1894, granting Chinese persons all the rights of protection accorded to subjects of the most favored nations.

What the Government cannot do directly it cannot do indirectly, for applying this non-bailing provision to appeals would involve imprisonment for months or years, and that even in cases where the Government appeals, as in the Lee Yen Tai case. In view of the Constitutional provisions about due process of law, and particularly of the 8th Amendment as to excessive bail, such construction would render the Act unconstitutional, and it is therefore untenable. The very point was decided by Judge Ross in *In re* Lintner, 57 Fed. Rep., 587, where he said:

> "They could not be put in the penitentiary at hard labor, as provided by Section 4 of the Geary Law, for the reasons given in the recent opinion of the District Court of this District, in the case of U. S. vs. Wong Dep Ken, and *any unreasonable detention of them*

by the officers would doubtless entitle them to discharge on writs of habeas corpus."

See cases quoted *supra*, also (Point I) particularly Case of the Chinese Wife, 21 F. R., 808 (p. 10, *supra*).

The application of the treaty provisions as to protection of person of Chinese persons should also be noted here, together with the fact that the subsequent treaty of 1894 repeals Section 2 of the Act of 1893 by its article V, if the Government's construction of the former section be correct.

POINT VI.

The provision cannot be applied where the defendants claim American citizenship, or where the Commissioner's jurisdiction is attacked, as is here the case.

It is well settled that the Acts do not apply to Chinese persons born within the United States (U. S. vs. Wong Kim Ark, 169 U. S., 649). The Courts cannot, while this question is *bona fide* in controversy, decide the question in advance once for all times and courts, and refuse bail on appeal. Hence, as shown, in the report of the Wong Kim Ark case, 169 U. S., at 652, bail was there properly allowed even to a Chinese person seeking to land within the United States under the claim of American citizenship, notwithstanding the prohibition of Sec. 5 of the Act of 1892. The cases of these appellants present this claim.

So, also, where the jurisdiction of the Commissioner who ordered deportation is in good faith

attacked, this Court should not decide in favor of jurisdiction by giving the order, in advance of final decision, the force of one made with jurisdiction (Hudson vs. Parker, *supra*).

In the case of Lee Yen Tai, in fact, Judge Brown, on habeas, has held that the Commissioner was without jurisdiction, and the Government appeals; yet it seeks to enforce this order, held to be without jurisdiction, and to give it the effect of a valid order. If the Government's contention be right as to the application of this provision to such a case, any white citizen of the United States may be imprisoned indefinitely, if some one chooses to proceed against him under the Chinese Exclusion Laws, and some Commissioner decides the questions of fact against him on the ground that he has not met the burden of proof thrown on him by Section 3 of the Act of 1892 to the Commissioner's "satisfaction" by "affirmative" evidence.

Of course the right to a supersedias pending appeal is clear (*In re* Claasen, 140 U. S., 200; Cheong Ah Moy vs. U. S., 113 U. S., 216.

The motion should be denied.

Respectfully submitted,

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